No. 183.

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Supreme Court of the United States.

OCTOBER TERM, 1900.

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THE ST. PAUL GAS LIGHT COMPANY,
Plaintiff in Error.

vs.

THE CITY OF ST. PAUL,
Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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St. Paul, Minnesota.

Supreme Court of the United States.

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vs.

THE CITY OF ST. PAUL,
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STATEMENT.

This cause is brought into this court upon a writ of error to the Supreme Court of the State of Minnesota, the plaintiff in error asking for a review and reversal of the final judgment rendered in that court in favor of the defendant and against the plaintiff, on the twelfth day of December, 1899. The action was brought in the District Court of the

State of Minnesota to recover the sum of $1426.46, with interest, claimed to be due from the defendant to the plaintiff, as interest upon the original cost of certain street lamps and lamp posts furnished and put up by the company in the streets of the city of St. Paul, at the instance and request of the city, under the provisions of section 9, chapter LIII, Special Laws of Minnesota, 1856, being an act of the legislature of the territory of Minnesota, entitled, "An act to incorporate the St. Paul Gas Light Company," approved March 1, 1856.

The cause was tried before the court without a jury, and thereafter the court made and filed its decision containing its findings of fact and conclusions of law, and directing judgment in favor of the plaintiff for the amount claimed in its complaint, with interest and costs. (Transcript, Fol. 56-71). Judgment was entered in accordance with this direction, from which the defendant appealed to the Supreme Court of the State. That court, on November 14, 1899, made and filed its decision, holding that the plaintiff was not entitled to recover, reversing the judgment of the district court, and directing judgment to be entered in favor of the defendant. (Transcript, Fol. 76-81). Thereupon judgment was duly entered in the Supreme Court of the State of Minnesota, on the twelfth day of December, 1899, reversing the judgment of the court below and adjudging that the plaintiff take nothing by its action against the defendant and that the defendant go hence without day, and have and recover of the plaintiff its costs and disburse-

ments, amounting to $59.58, with execution to enforce the same.

It is not claimed by the plaintiff that it has any contract with the defendant city, obligating the latter to pay interest upon the original cost of these street lamps, lamp posts and their connections, except as the legislative act of 1856, above referred to, and the acts of the defendant thereunder, in directing the plaintiff by resolution of its common council, to erect and light gas lamps in the streets of the defendant, and the action of the plaintiff, in obedience to such orders, in providing, setting up and maintaining such lamps and their connections, operated as a contract between the plaintiff company and the defendant city. Brief reference will be made to the provisions of this act. By the first section thereof, certain parties therein mentioned are created and constituted a body corporate by the name of the St. Paul Gas Light Company, with full power and authority, at any time thereafter, to manufacture, make and sell gas to be used for the purpose of lighting the city of St. Paul and the streets, avenues, lanes, alleys and squares thereof, and any building, manufactories or houses therein contained, and attempts to grant to the company the exclusive right to lay pipes for the purpose of conducting gas in any of the streets, avenues, lanes, alleys and squares of the city, and to adopt any other necessary means to furnish gas to the inhabitants of said city.

By section 9 of the act, it is made the duty of the corporation to prosecute the work necessary to

lighting the whole city and suburbs with gas and to lay their pipes in every and all directions whenever the board of directors shall be satisfied that the expense thereof shall be counterbalanced by the income accruing from the sales of gas, and it is provided:

"That whenever the corporation of the City of St. Paul shall, by resolution of the Board of Aldermen, direct lamps to be erected and lighted in the streets of the city, the company shall make contract therefor, and furnish and provide, lay, set up and keep in good repair, at their own proper expense and charge, the street posts and lamps and their pipes and meters, all to be of the best quality of work and material now in use. In consideration whereof the said corporation of the city shall pay quarterly to the St. Paul Gas Light Company an interest of eight per cent per annum on the amount of the sum of the original cost of said street lamps and lamp posts, gas meters and gas pipes, and the cost of laying and erecting the same, but said company shall not be bound to lay every pipe in such places where the proceeds from the sale of gas light would not be sufficient to defray the expenses of furnishing same."

Section 10 of the act contains provisions for an appraisal of the property and the purchase thereof by the city, at its option, after the expiration of twenty years from the first day of January, 1857.

By Section 11 it is provided, that in the event the city shall decline to purchase at the end of the twenty year period mentioned in Section 10, the city shall again have the right to make such purchase at the end of twenty years from and after the first day of January, 1877, upon certain conditions

as to valuation and payment therein specified.

By section 14 of the act, it is provided that

"The corporation of the City of St. Paul and the board of directors of the St. Paul Gas Light Company, may contract for and make regulations relating to the lighting of said city with gas, in such manner as may be agreed upon, and they may make generally such contracts in relation to the business of the company as may be beneficial to them and the public."

By section 15, it is provided that the act shall be in force for twenty-five years from the first day of January, 1857, unless the company shall sell and convey within said term of twenty years, their plant and property to the city, in which case the privileges granted by the act shall be vested in the mayor, aldermen and citizens of the city in their corporate capacity. But it is provided that if the city shall not resolve to purchase at either of the times specified, then the act shall be in force for an additional term of ten years from and after the last date mentioned, for such sale and purchase, and no longer.

It is conceded that the city has at no time availed itself of its right to purchase the plant of the company and succeed to its rights under the provisions of the act. It is also conceded that after the passage of the act of March 1, 1856, the plaintiff accepted the same and did perform the various acts and things therein required to be performed by it as conditions to the vesting in it of the powers, rights and privileges thereby conferred.

The trial court found that in order to do so, the

plaintiff has constructed extensive gas works and laid mains and gas pipes in many of the streets of the city, and has invested large sums of money in the construction of its works and in the laying of its gas pipes and mains and in other ways incident to its business, and that, at various times heretofore subsequently to the performance by the plaintiff of the conditions named in the act, i. e. subsequent to the year 1857 and prior to January 1, 1897, the City of St. Paul, from time to time, by resolution of its board of aldermen and its common council, directed lamps and lamp posts to be erected and lighted by the plaintiff in the streets of the city of St. Paul, to the aggregate number of 3362, and that in every such case the plaintiff has furnished, provided, laid, set up and kept in good repair, at its own proper expense and charge, all such street lamps and posts and the pipes and meters connected with, necessary to supply the same, and that since the installation of each of said lamps, the company, except as otherwise found by the court, has supplied the same with illuminating gas and kept them lighted nightly, under express contract or contracts with the city, at a price per lamp, per year, and for a period specified in each of said contracts. (Transcript Fol. 59).

The court also found that on March 14, 1896, the plaintiff and the defendant entered into a written contract for the furnishing of the necessary gas and lighting the streets of the city for a period of one year from April 1, 1896, and a complete copy of this contract is annexed to the decision of the

court as "Exhibit A" thereof, and is found on pages 28 to 31 inclusive of the transcript of record in this court.

The court further found that the specifications recited in this contract contained the following provision, which is the only provision in said specifications in any way material to the issue between the parties to this action, to-wit:

"The district to be covered by gas lighting includes all the streets in the territory now lighted by gas. The number of gas lights now in service and to be lighted and maintained until otherwise ordered, is 3031. The right however, is reserved to said city to decrease, from time to time, the number of lamps in service, and to discontinue the lighting by gas of the whole or any portion of any street or particular number of streets, of any particular section of said city, and from and after service by said city upon said contractor of written notice of the discontinuance of any such lamp or lamps, the contractor shall not be entitled to any compensation for the further lighting of the lamp or lamps so ordered discontinued."

The court also found that on the sixteenth day of March, 1897, the plaintiff and defendant entered into a further written contract for the furnishing of gas and lighting said street lamps for the period of nine months from and after the first day of April, 1897, at a stipulated price for each lamp, and that the specifications incorporated into this contract contained the same provisions as to the district to be covered by gas lighting, the number of lamps in service and the discontinuing of lamps and the lighting thereof, as was contained in the contract of March 14, 1896, herein above refered to,

and also contained the following provision:

"It is also expressly understood and agreed that none of the terms or provisions of this contract are to be construed to waive or modify in any way the claim of said company, that said city of St. Paul is under obligation to pay to said St. Paul Gas Light Company interest at the rate of eight per cent per annum, payable quarterly, upon the original cost of the street lamps, lamp posts, gas meters, gas pipes and the cost of erecting and laying the same at any time provided by said St. Paul Gas Light Company, at the request or order of said city of St. Paul, under the provisions of section 9 of the act of the legislature of the said State of Minnesota, constituting the charter of said St. Paul Gas Light Company, it being understood that neither party to this contract, by the execution thereof, waives any of its rights or claims in reference thereto." (Transcript Fol. 60-61).

The court further found that prior to the first day of January, 1897, the defendant under the provisions of the contract of March 14, 1896, directed the plaintiff to cease to light 672 of the street lamps then in service, and terminated,as to said 672 lamps so ordered discontinued, the contract between the plaintiff and the defendant, under which the plaintiff had theretofore supplied gas thereto and lighted the same, and plaintiff thereupon ceased to light said 672 lamps and defendant ceased to pay for the supply of gas thereto or the lighting thereof. And that between January 1, 1897, and December 31, 1897, inclusive, the plaintiff supplied gas to and lighted, under contract between the plaintiff and the defendant, only 2690 of the said 3362 street lamps, while 672 of said lamps remained, during the said period, out of service, idle and unused, and

the parties have made no further contract for the lighting thereof. (Transcript Fol. 61-62).

The court also found that the original cost to the plaintiff of the purchase and erection of the 3362 street lamps and posts, and appliances connected therewith, put in by the company at the request of the city, at various times between the first day of January, 1857, and the first day of January, 1897, was $85,539.53, and that the sum of the original cost of said 672 discontinued lamps and the erection thereof, and of the purchase and laying of the service pipes connected therewith, was $17,830.75.

The court found that the defendant had paid to the plaintiff interest at the rate of eight per cent per annum upon the original cost of each of said 3362 street lamps and the service pipes connected therewith, for the whole period lapsing between the period of the erection and laying of such lamps and service pipes and the first day of January, 1897, and has since continued to pay interest upon the original cost of all of said lamps and service pipes, except 672, of them which were discontinued, as aforesaid. (Transcript Fol. 62).

The court also found that on the first day of July, 1897, or immediately thereafter, the plaintiff demanded of the defendant the payment of interest for the six months next preceding said day, at the rate of eight per cent per annum, upon the cost of 3362 street lamps and posts, erected by the plaintiff prior to January 1, 1897, and thereafter, and on the first day of January, 1898, or immediately thereafter, plaintiff demanded of de-

fendant payment of interest for the period of six months next preceding the said day, at the same rate, upon the original cost of all said street lamps and posts. The city, a short time after these respective demands, paid to the company interest at the rate of eight per cent per annum upon the 2690 of said street lamps then actually in service, but declined and refused to pay any interest whatever on account of the original cost of construction of the 672 of said street lamps, the lighting of which was discontinued on and prior to the first day of January, 1897, under the provisions of the contract of March 14, 1896, above referred to, the city insisting that it was under no obligation to pay interest upon the cost of unused and dismantled gas posts which the company was not required or permitted to keep lighted or in service under the provisions of the contracts of March 14, 1896, and March 16, 1897, between the city and the company, herein above referred to.

The city authorities, desiring that these unused and dismantled posts should be removed from the streets of the city, on August 20, 1897, by action of its common council adopted the following resolution:

"Resolved, that the St. Paul Gas Light Company be, and the same is hereby required forthwith to remove the gas street lamp posts in that portion of the city now lighted by electric light, under contract with said company, and which said lamps have been discontinued by order of the board of public works. Resolved further, that the board of public works is hereby required to transmit to the city comptroller a statement, showing the number

and location of said gas street lamp posts not now in service in such electric light district above referred to, and that from and after the passage of this resolution, no interest be paid by the City of St. Paul to said St. Paul Gas Light Company on account of the cost of the purchase and equipment of said gas street lamp posts."

The plaintiff insists that the provisions of section 9 of the act adopted by the legislature of the territory of Minnesota on the first day of March, 1856, together with the action of the defendant in requesting and directing from time to time that the company erect and put up street lamps in the various streets of the city, constitute an irrevocable contract, between the city and the company obligating the city to pay interest at the rate of eight per cent per annum upon the cost of each one of the lamps and posts so put in from the time of the erection thereof until the expiration of the life of the corporation, which will be on the first day of January, 1907. And it is claimed that the resolution adopted by the common council of the city of St. Paul, directing that the dismantled and unused lamps, standing at various places in the streets of the city, in the district now lighted by electric light, under contract with this same company, should be removed, and that no further interest should be paid on account of the cost of the construction of these street lamps and posts, is in effect a law of the State of Minnesota impairing the obligation of the plaintiff's said contract, and that by the adoption of this resolution, the defendant has undertaken to deprive the plaintiff of its property with-

out due process of law and without just compensation, and that this is in violation of certain provisions of the federal constitution to which reference is made in the writ of error.

ARGUMENT.

I.

It is respectfully submitted that upon the record in the case at bar, this court has no jurisdiction of a writ of error to review the final judgment of the supreme court of the state of Minnesota. The action, as we have seen, was brought in the state court to recover a sum of money claimed by the plaintiff to be due from the defendant as interest upon the original cost of certain street lamp posts, and their connections, erected by the plaintiff at the instance of the defendant, in the streets of the city of St. Paul. The asserted right of the plaintiff to receive interest upon the original cost of these lamp posts and connections, is based wholly upon the provisions found in section 9 of the legislative act constituting the charter of the company. It may be conceded that the act of 1856, granting to the plaintiff the right to lay its pipes and mains in the streets of the defendant city, and to supply gas to the municipality and its inhabitants, is the grant of a franchise vested in the state, and that it, together with the performance by the grantee, of the conditions and obligations imposed upon it thereunder, constitutes a contract between the parties, and that this

contract is protected by the constitution of the United States against subsequent state legislation to impair it. But the sole question passed upon by the court below, and upon which its judgment was rested, was whether upon a proper construction of the language contained in the act, the city by ordering the company to put in the necessary lamps and posts and to light the streets of the city thereunder became obligated to pay interest upon the original cost of construction of the street lamps and posts ordered in, from time to time, by the city authorities, during a period commensurate with the life of the corporation itself, or only for such period as these lamps should be in service, lighted and maintained under contract between the company and the city. The state court held the latter to be "the more reasonable and proper construction of the provision of the charter, and the one which should be adopted. We are of the opinion that under these circumstances the charter does not require the city to pay such compensation for street lamps which it is not under any contract to use. We, therefore, hold that the city is not liable for such compensation for street lamps, after it has ceased to use the same and abandoned the use of gas in lighting its streets." (Opinion Canty, J., Fol. 80 Transcript).

There is not a word in the opinion upon the subject of the resolution adopted by the defendant's council on August 20, 1897, directing these disused and dismantled posts to be removed from the streets of the city, directing the board of public

works to certify to the city comptroller the number of lamps out of service and directing, in substance and effect, that thereafter the city comptroller should not audit or allow any claims on the part of the company for interest upon the original cost of the lamps and posts so removed.

The learned counsel for the plaintiff in error assumes to give to this simple resolution the force and effect of a legislative act of the state, and contends that the effect thereof, if it is not declared invalid and ineffectual, is to impair the obligation of the contract between the plaintiff in error and the defendant city. No one, except the learned counsel, has ever contended that the resolution has, or was intended to have, any such effect. The resolution, so far as it directs the removal of the dis-used and dismantled posts, was a proper exercise of the police power, granted to the city under the provisions of its charter, which vests in the common council the care, supervision and control of all public highways, bridges, streets, alleys, public squares, grounds, parks, sewers and other public improvements and property within the limits of the city. The gas company claimed the right to receive interest upon the original cost of putting in these lamp posts and their fixtures, notwithstanding the fact that the district in which they are located was lighted by electric light under a separate contract, and notwithstanding the fact that these lamp posts were no longer required, and that they had been eliminated from the written contract between the company and the city, providing

for the lighting of other portions of the city with gas for a period specified in the contract. The city denied this claim, and by action of its common council indicated its construction of section 9 of the company's charter, and in accordance with such construction, indicated its intention to refuse further payment of interest on the cost of the posts so ordered out. Payment was refused and the gas company brought suit. The trial court, construing the act of March 1, 1856, held that the defendant was under obligation to pay to the plaintiff quarterly, during the term for which the act shall remain in force, to-wit, to and including the thirty-first day of December, 1906,interest at the rate of eight per cent per annum, upon the cost of the entire 3362 street lamps ordered into service from time to time, between the date of the passage of the act and the first day of January, 1897, without regard to the question whether such lamps were in service under contract or were out of service and abandoned. (Fol. 64 Transcript). Based upon this single conclusion of law, judgment was entered in favor of the plaintiff for the amount unpaid. The court did not in any manner pass upon the effect of the resolution of August 20, 1897. It was not in issue in any manner. Nothing was claimed for it. An appeal was taken from this judgment to the supreme court of the state where the judgment of the trial court, based on its construction of the plaintiff's charter, was reversed. The appellate court sustained the defendant's contention that the company's charter does not re-

quire the city to pay interest upon the original cost of street lamps which it is not under any contract to use, and is not liable for such compensation after it has ceased the use of the same and abandoned the use of gas in lighting its streets. (Fol. 80 Transcript). The decision of the trial court and the decision of the appellate court as well, was confined solely to the question of the proper construction of the provisions contained in the gas company's charter. The record nowhere discloses that the court gave any force or effect to the resolution adopted by the city council. The resolution could not in any way affect the plaintiff's right to recover interest on the cost of these posts if it was entitled thereto under the provisions of its charter. No such effect was ever claimed for it and no such force was attributed to it by the court below. The defendant did not set up the resolution as a defense to the plaintiff's claim or in any way attempt to justify its refusal to pay by reason of its adoption. The court has not by its judgment or otherwise attempted to give it the force and effect sought to be given it by counsel for the plaintiff in error, in order to confer jurisdiction upon this court to review the judgment rendered by the highest court of the state denying plaintiff's asserted right to receive interest upon these abandoned posts. It is true there is in the record a certificate made by the chief justice of the supreme court of the state of Minnesota, on December 28, 1899, the day upon which the writ of eror to this court was allowed, to the effect that upon the argument there was drawn in ques-

tion the validity of this resolution and of the statutes of the state, authorizing the adoption of the same on the ground that the same were laws of the state of Minnesota repugnant to section 10 of article I of the constitution of the United States, and that the decision of the court was in favor of its validity.

The certificate of the presiding judge of the state court, as to the existence of grounds upon which the interposition of this court might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to re-examine the judgment below.

Sayward v. Denny, 158 U. S. 180.

It must appear from the record itself, by clear and necessary intendment, that the Federal question was directly involved, so that the state court could not have given judgment without deciding it; that is a definite issue as to the possession of the right must be distinctly deducible from the record, before the state court can be held to have disposed of such Federal question by its decision.

Powell v. Brunswick Co., 150 U. S. 400, 433.

In order to come within the provisions of the constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state and not at the decision of its courts, or the acts

adminisrtive or executive boards or officers, or the doings of corporations or individuals.

New Orleans Water Works Co. v. Louisiana Sugar Refining Co., 125 U. S. 18, 39.

In the case just cited, the various decisions of this court upon the question of the jurisdiction of the court to re-examine the judgment of the highest court of a state on the ground that the obligation of a contract has been impaired by a law of the state, which has been given force and effect by the judgment of the state court, are fully reviewed and considered. The court, on page 38 of the opinion, says: "The result of the authorities, applying to cases of contracts the settled rules, that in order to give this court jurisdiction of a writ of error to a state court, a Federal question must have been expressly or in effect decided by that court, and therefore, that when the record shows that a Federal question and another question were presented to that court, and its decision turned on the other question only, this court has no jurisdiction, may be summed up as follows: When the state court decides against a right claimed under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction. When the existence and the construction of a contract are undisputed and the state court upholds a subsequent law on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has jurisdiction. When the state court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract, and if it is of opinion that it did not confer the rights affirmed by the state court, and therefore its obligation was not impaired by the subsequent law, may, on that ground, affirm the judgment; so, when the state court upholds the subsequent law on the ground that the contract did not confer the righ claimed, this court may inquire whether the

supposed contract did give the right, because if it did, the subsequent law cannot be upheld. But when the state court gives no effect to the subsequent law, but decides on grounds independent of that law, that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been pased, and this court has no jurisdiction."

It would seem to be clear that the case at bar is controlled by the first and fifth of these rules. Here the state court, by its judgment, has decided against the right claimed by the plaintiff in error, to recover for interest upon these disused lamps and posts, not because of any law of the state amending or modifying the original contract between the parties, but because the contract, when properly construed, does not impose upon the defendant the obligation to make such payment. Again, within the fifth rule, the state court has given no effect to the resolution, claimed by the plaintiff to be a subsequent law of the state, but has decided on grounds independent of that law, that the right claimed was not conferred by the contract, and therefore the case stands just as if the resolution had not been passed, and this court is without jurisdiction.

It is true that any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state, within the meaning of the act regulating the appellate jurisdiction of this court over the judgments and decrees of the state court. Williams v. Bruffy, 96 U. S. 176. It was said by this court, in New Orleans Water Works Co. v. Louisiana Sugar Co., 96 U. S., at page

31 of the opinion, that "A by-law or ordinance of a municipal corporation *may be* such an exercise of legislative power delegated by the legislature to the corporation as a municipal subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the constitution of the United States." In support of this declaration, the court cites United States v. New Orleans, 98 U. S. 381; Merriwether v. Garrett, 102 U. S. 472; Murray v. Charleston, 96 U .S. 432, and Home Insurance Co. v. City Council of Augusta, 93 U. S. 116. In each of these cases the ordinance under consideration was adopted in the exercise of the power of determining what persons and property should be taxed, and this power, it was said, belongs exclusively to the legislative branch of the government, and whether exercised by the legislature itself, or delegated by it to a municipal corporation, is strictly a legislative power.

In adopting the ordinance in question, directing these disused lamp posts to be removed, and directing that no interest should be paid upon the original cost of the lamps so removed, the city was not acting in the exercise of any legislative power conferred upon it by the state.

Under the provisions of the act of the legislature of the state of Minnesota, constituting the charter of the city of St. Paul (Sec. 3, Chapter 1, Special Laws, 1874) the common council of the city is vested with certain legislative powers. It is provided

that "The Common Council shall have the management and control of the finances (subject to the provisions of this act) and all the property of the city, and shall likewise, in addition to the powers herein vested in them, have full power and authority to make, enact, ordain, establish, publish, enforce, alter, modify, amend and repeal all such ordinances, rules and by-laws for the government and good order of the city, for the suppression of vice and intemperance, and for the prevention of crime, as they shall deem expedient. * * * The Common Council shall have full power and authority to declare and impose penalties and punishment and to enforce the same, against any person or persons who may violate any of the provisions of the ordinance, rule or by-law passed or ordained by them; and all such ordinances, rules and by-laws are hereby declared to be and have the force of law, provided that they be not repugnant to the constitution and laws of the United States or of this state; and for these purposes shall have authority by ordinances, resolutions or by-laws, 1st. To regulate the exhibition of common show-men and shows of all kinds. * * * 2nd. To restrain and prohibit all description of gaming and fraudulent devices. 3rd. To prevent riots, noise, disturbance and disorderly assemblages in said city." Then follows an enumeration of the various subjects upon which power to legislate is given, forty-one in all, relating to the exercise of the usual police powers of municipalities and including also the grant of authority to levy taxes for the support of the city

government. The legislature has not, in any manner, delegated to the common council of the city of St. Paul, any general power to legislate for the people of the city, or to pass laws upon any subject, except those specifically enumerated in the charter. It will be seen that by express provision of the charter, the legislative power of the common council is confined to enactment of ordinances, rules and by-laws for the government and good order of the city, for the suppression of vice and intemperance, and for the prevention of crime, and it is only the ordinances, rules and by-laws enacted for these purposes, that are by the legislative act declared to be and to have the force of law. The resolution under consideration here amounted simply to a declaration of the construction placed by the city authorities upon a provision of the gas company's charter, to which reference has been made, and a denial of any obligation upon the part of the city, to pay interest upon the original cost of the posts ordered to be removed. The resolution could not have the force or effect of a law of a state. The common council, by the adoption of an ordinance or resolution, could not in any way modify or amend the provisions of the legislative act constituting the charter of the gas company, and the council did not assume to do so. It merely spread upon its records a declaration of its contention that the act of 1856, when properly construed, did not impose upon the city the obligation to pay interest upon the original cost of the gas posts and of lamps no longer in service, and which had been discon-

tinued under the provisions of the existing contract between the company and the city. See New Orleans Water Works Co. v. Louisiana Sugar Co., 125 U. S. 18, 39; Railroad Co. v. Ellerman, 105 U. S. 166, 172; Day v. Green, 4 Cush. 433, 438.

The state court, by its decision and judgment, did not assume to hold that the city of St. Paul, by ordinance or by resolution of its common council, could amend or modify the existing contract between the gas company and the city, growing out of the enactment of the legislative act of March 1, 1856, and the acceptance thereof by the grantee and by the city. The court did not hold the resolution to be a law of the state and did not hold that the resolution stood in the way of the enforcement of any right conferred upon the gas company by the act of 1856. In fact the force and effect of that resolution as a law was never passed upon, either by the trial court or by the supreme court of the state. Nothing was ever claimed for the resolution except as a denial of liability and an indication of the refusal of the city to pay, because upon its construction of the contract it was not liable for such payment. In order to give this court jurisdiction to re-examine the judgment of the state court, it must appear from the record in effect, that but for the pasage of this resolution the company would be entitled to recover, but that the court gave force and effect to the resolution, to defeat such right of recovery.

It may be that if this court had been called upon in the first instance, to construe the act of 1856, it

would have placed a different construction upon section 9 than that placed upon it by the state court. But this court is "not authorized by the Judiciary Act, to review the judgment of the state courts because their judgment refuses to give effect to valid contracts, or because those judgments, in their effects, impair the obligations of contracts. If we did, every case decided in the state court could be brought here, where the party setting up a contract alleged that the court had taken a different view of the obligation to what he held. Miller vs. Knox, 12 Wall. 379; Land Company vs. Laidley, 159 U. S. 103; Bacon vs. Texas, 163 U. S. 207."

In Land Company vs. Laidley, supra, this court said:

"In order to come within the provision of the constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of the contract have been impaired, but it must have been impaired by some act of the legislative power of the state, and not by decision of its judiciary department only. The appellate jurisdiction of this court upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature, alleged to be repugnant to the constitution of the United States, has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court."

It is respectfully submitted that the writ of error should be dismissed.

II.

If this court shall hold that it has jurisdiction to re-examine the judgment of the supreme court of the state of Minnesota, then the second question arising upon the record is as to the correctness of the construction placed upon the act of 1856 by the state court. It will be observed that the act of 1856, constituting the charter of the gas company, confers upon the company the absolute and exclusive right to lay gas mains, and furnish a supply of illuminating gas for the city of St. Paul and its inhabitants, for a period of fifty years from the first day of January, 1857. The exclusive right here granted has the effect of shutting out and debarring any other person or corporation from furnishing illuminating gas to the city or its inhabitants. (11 A. & E. Enc'y. Law, 579). If the city wants its streets lighted by gas, it must enter into a contract with this company. As held by the court below, the charter provides no way in which the city can procure gas to light its streets except that provided by section 14, under which the city must make a contract voluntarily entered into by both parties. It is true, that by section 9 of the act, it is provided that whenever the city, by resolution of its board of aldermen, directs "lamps to be erected and lighted in the streets of the city, the company shall make contract therefor, and provide, lay, set up and keep in good repair, at their own expense and charge, the street posts and lamps and their pipes and meters." This provision makes it

obligatory upon the gas company to "make contract" whenever the city, by its board of aldermen, directs its streets to be lighted by gas, provided that the sale of gas in the section of the city so directed to be lighted, will be sufficient to defray the expense of furnishing the same. The city and the company are given authority, by section 14 of the act, to make such contracts as may be beneficial to the company, the city, and its inhabitants. The period for which the contract is to be made, the price of gas per thousand feet, or per lamp per year, the number of hours in each day during which the lamps are to be lighted, and all of the details of the contract, with one exception, are left to the determination of the contracting parties. The single exception relates to the furnishing of the lamps, lamp posts and connections. This one element of the contract is determined by the act itself. The company is required to furnish these necessary fixtures and the city, in consideration thereof, is required to pay interest upon the cost of this equipment at the rate of eight per cent per annum. The act is silent upon the question as to the term for which the contract is to be made; the time for which the interest payment is to be made is not prescribed by the terms of the act. It seems clear that these are matters left to be determined by mutual agreement between the parties.

The court should not hold, as contended by counsel for plaintiff in error, that the legislature intended that before the city should be enabled to light its streets with gas for any period of time, however

short, it should be obliged to incur an obligation to continue the payment of interest upon the cost of the necessary fixtures for a period of fifty years, unless the language of the act is so clear as to admit of no other construction. The court below denied that this was the necessary or proper construction to be placed upon the language contained in section 9 of the act. The court said:

"It seems to us that it would be unreasonable to hold that if, at the inception of the fifty years which this charter was to run, the city had ordered such street lamps to be erected, had used them ten years under a contract for lighting the streets, which expired at the end of that time, and then on account of some such contingency has ceased to light the streets with gas, the city would be bound to pay such compensation for maintaining and keeping in repair the street lamps, lamp posts, conecting pipes and meters, for forty years more, and to permit them to encumber the streets for that length of time, although the city had not a particle of use for such street lamps during all that time."

The court further held that under the provisions of section 9, the city did not have the right, in its discretion, to compel the erection of street lamps regardless of how long the city might use them, and without protecting the gas company by stipulating a reasonable length of time during which the city should use them. It was held that the gas company was under obligation to enter into a contract with the city, but that in making such contract the company could abundantly protect itself by insisting that the contract should cover a period of time of sufficient length, so that the interest, at the rate of eight per cent per annum, to be paid during that

time, would be sufficient to remunerate the company for the necessary outlay. (Transcript, Fols. 78, 80). This construction of the act is entirely reasonable and is just and fair to both parties. The time for which the contract to be made between the parties was to run, the cost of furnishing the gas, the cost of putting in these necessary fixtures, were all matters which might be taken into consideration in fixing the total contract price. Assuming such a contract for a period of twelve years, which would not ordinarily be considered an unreasonable time, it is obvious that the company would receive back the entire cost of putting in the posts, in addition to the sum paid for furnishing the gas and lighting the lamps, and would still own the posts and connections. The city not only had no "power under the charter to compel the streets to be lighted, except by making for that purpose a contract voluntary as to both parties," as determined by the court below (Transcript, Fol. 79), but it was not required to lay its pipes at all in localities where the proceeds from the sale of gas would be insufficient to defray the expense of putting in and furnishing the same. But, when the company was ordered to put in its mains, and put up street lamps and connections, in a locality where the proceeds derived from the sale of gas would be sufficient to defray the expense, then the company was bound to enter into a contract with the city, and to provide and put up the necessary gas fixtures for the purpose of lighting such streets, the necessary gas and the labor of lighting and extinguishing the

lights and keeping the lamps in proper condition, to be supplied at a reasonable price to be agreed upon between the city and the company. To avoid question as to whether the city or the company should defray the cost of putting in the posts and connections, which may be termed the "gas fixtures," the act provided that this should be done at the expense of the company, but that the city should pay interest upon the outlay at the rate of eight per cent per annum during the life of the contract.

It is to be borne in mind that the asserted right of the company to receive interest upon the original cost of these street lamps and their connections, rests wholly upon the legislative act of 1856 above referred to. The construction claimed by counsel for the plaintiff in error, would render the provisions of that act unreasonable and burdensome. It should not be given such construction unless the language clearly, and without uncertainty, requires it. The company was granted a valuable franchise, exclusive in its character, authorizing the company to lay and maintain its mains and pipes in the streets of the city, including the exclusive right to supply gas to the city and its inhabitants for a period of fifty years, and this without any compensation whatever. The usual rule of construction applicable to such grant of power, to claims of right or immunity asserted under it, is that

"Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but

what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim."

Fertilizing Company v. Hyde Park, 97 U. S. 666.

Ambiguous words in a charter or franchise must be construed most strongly against the corporation. They are to be strictly construed and nothing allowed by implication.

Water Works Company v. San Francisco, 52 Cal. 111.

It is a reasonable presumption that the state has granted in clear and unmistakable terms, all that it has intended to grant. In case of ambiguity, the doubt is to be resolved against the asserted right or immunity.

Cooley on Taxation, 209.

In order to sustain the defendant's contention and construe this act in accordance therewith, it becomes necessary to read into the act providing for the payment of these interest charges, the words "from the date of the furnishing of the same respectively to the date of the expiration of plaintiff's charter"; the language employed by counsel in the petition for writ of error herein. (Transcript, Fol. 2). It is respectfully submitted that it is quite as reasonable to read into the act the words "during the period for which such contract shall be made," thereby placing some reasonable restriction upon the period for which interest is to

be paid upon the cost of putting in these posts and their connections. But, as we have seen, it is not necessary, in order to support the defendant's contention, and in order to support the conclusion reached by the court below, to read any words into the act, for inasmuch as no term is prescribed in the act itself for which these interest charges are to continue, the right to recover interest during the charter life of the company, is not given in unmistakable terms or by necessary implication. The affirmative is not shown. Silence is negation, and doubt is fatal to the plaintiff's claim.

III.

It was argued by counsel for the plaintiff in error, in the court below, that the parties themselves, by their conduct and dealings, had placed a practical construction upon the provision contained in section 9 of the act of 1856, relating to the payment of these interest charges. It was urged that in many of the contracts made between the parties from time to time, after the passage of the act, down to the year 1897, there was inserted in the contract a recital to the effect that the city is under obligation to pay to the company interest upon the original cost of the street lamps, lamp posts, gas meters, gas pipes, and the cost of erecting and laying the same at any time provided by the company for the service of the city, at its request and upon its order, and counsel argued that the city should be estopped to deny the correctness of what was said to be a practical construction of

the provisions of this section, in accordance with the plaintiff's contention. This claim may be renewed in the argument before this court. The court below, upon full argument upon the record before it, held this claim to be untenable. (Transcript, Fol. 80). This ruling was entirely correct. No provision was made in these various contracts for the payment of interest upon the gas lamps, posts and connections then in service and required thereby to be maintained and lighted with gas. Each of the contracts provided for the payment of a fixed amount per lamp, per annum, for the necessary gas and the lighting thereof, during the period covered by such contract, and the recital in question was intended to indicate that in addition to this amount the company should have the right to receive, and the city should pay interest upon the cost of the lamps and posts in service during such period.

If this court, upon an examination of the record, reaches the conclusion that the resolution adopted by the common council of the city of St. Paul on August 20, 1897, is a law of the state of Minnesota, and that the court below gave force and effect to it as a law of the state, whereby the contract rights of the plaintiff in error are claimed to be impaired, then this court, as it has frequently held, has the right, and it becomes its duty, to examine the act creating the asserted contract right and to decide for itself independently of the adjudication of the court below whether or not the language of the act is expressive of the contract right asserted

by the plaintiff in error. But, I assume that this court will not take jurisdiction for the purpose of passing upon the question whether the parties, by their conduct and course of dealing, have or have not given to the act a practical construction in accordance with that claimed by the plaintiff in error. Nor will this court undertake to determine upon considerations not appearing upon the face of the act itself whether the city should be held estopped to deny the correctness of such construction.

It is respectfully submitted that unless the construction placed upon this legislative enactment by the highest court of the state enacting it, is palpably erroneous, the decision of that court should be followed here. I submit, in all confidence, that the conclusion and the judgment of the state court are correct and in accordance with right and justice, and that if this court has jurisdiction to reexamine the judgment, it should be affirmed.

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